FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 15 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 567.

HARRY M. VEIX,
Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, a corporation,
Appellee.

APPEAL FROM NEW JERSEY SUPREME COURT.

REPLY BRIEF ON BEHALF OF APPELLANT.

WALTER P. REILLY.
JAMES L. HANDFORD,
Counsel for Appellant.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

SUBJECT INDEX.

PAGE

I. The Revised Statute 17:12-53 and all its sources are properly before this Court for its determination as to their unconstitutional effect upon appellant's federal rights, and not solely Pamphlet Laws, 1932, chapter 102 1

II. The Statute of Limitations cannot be interposed as a defense against appellant's rights to sue and recover under his contract 5

III. The withdrawal right is an integral part of appellant's contract and not a mere privilege.... 6

IV. Chapter 102 P. L. 1932 impairs appellant's vested contract rights and his vested property rights 11

V. Chapter 65 P. L. 1925, in so far as applied to appellant, did not make him an equal participant with all the other members 13

Cases Cited.

	PAGE
Adam v. *Saenger*, 303 U. S. 59	3
Bryant v. *Zimmerman*, 278 U. S. 63	4
Bucsi v. *Longworth Building & Loan Association*, 119 N. J. L. 120	12
Cohen v. *Swink*, 3 S. E. (2nd) 471, 476 (Va.)	13
Crowell v. *Randell*, 10 Peters 368	4
Goldrick v. *Gulf Oil Corp.*, 84 Sup. Ct. Rep. 336	4
Honeyman v. *Hanan*, 300 U. S. 14	4
Intiso v. *Metropolitan Savings and Association*, 68 N. J. L. 588	7, 8
Koewing v. *West Orange*, 89 N. J. L. 539	3
Lehigh Valley R. R. v. *United Lead Co.*, 102 N. J. L. 545	3
Lynch v. *New York*, 293 U. S. 52	4
McCullough v. *Virginia*, 172 U. S. 102	3
Morley v. *Railway Co.*, 146 U. S. 162	7
New York v. *Central Savings Bank*, 306 U. S. 661	4
Roby v. *Colehour*, 146 U. S. 153	4
Sautter v. *Supreme Conclave Improved Order of Heptasophs*, 76 N. J. L. 763, 765	10, 11
Smythe v. *Inhabitants of New Providence Township*, 253 Fed. 824, 831	6
St. Louis Iron Mountain and Southern Railway Company v. *Starbird, Administrator of Miller*, 243 U. S. 592	4
Treigle v. *Acme Homestead Association*, 297 U. S. 189	14
Truax v. *Corrigan*, 257 U. S. 312	3

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 567.

HARRY M. VEIX,
Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, a corporation,
Appellee.

On Appeal from New Jersey Supreme Court.

REPLY BRIEF ON BEHALF OF APPELLANT.

I.

The Revised Statute 17:12-53 and all its sources are properly before this Court for its determination as to their unconstitutional effect upon appellant's federal rights, and not solely Pamphlet Laws, 1932, chapter 102.

We treated this in Point One of our brief filed in opposition to the motion to dismiss this appeal, and will here endeavor merely to supplement what is there said.

The appellee at pages 7 and 8 of its Brief states that the New Jersey Courts did not have R. S. 17:12-53 before them, and could not be required to pass upon the constitutionality of that Act, because appellee alleges that Par. 11

of Appellant's Complaint is argumentative in form and was not answered by the appellee, and because the appellee's answer which specifically pleaded R. S. 17:12-53 as a separate defense was never reached by the New Jersey Courts from the standpoint of testing its legal efficacy. It is respectfully submitted that the appellee has completely lost the effect of those pleadings. It is immaterial for the purpose of this argument to consider their legal efficacy. The effect of those pleadings was to apprise and did apprise the New Jersey Courts that the sole question involved was the constitutionality of R. S. 17:12-53 and its sources enacted from 1932, as these later statutes effect appellant's contract.

The New Jersey Courts were aware of this for the further reason that appellee served Notice of Motion to Strike the Complaint of appellant (R. 8), and therein specifically set up R. S. 17:12-53 as the ground of its motion to strike.

When the trial court ruled in favor of appellee's motion, it necessarily held adversely to the appellant's Federal Rights as set forth in his Complaint (R. 1, 2, 3 and 4); which ruling had to be based upon the grounds set forth in appellee's motion to strike the Complaint, and further the appellant's grounds of appeal to the New Jersey Court of Errors and Appeals specifically set forth the unconstitutionality of R. S. 17:12-53 (R. 11, 12).

The legal effect of appellee's Notice to Strike the Complaint (R. 8) is the same as a demurrer at common law (Rule 40 of the New Jersey Supreme Court).

Under Rule 40 when appellee moved to strike the appellant's complaint on the grounds set forth in its notice, the effect of the motion was equivalent to a demurrer, admitting facts well pleaded but not conclusions of law. *Ko-*

ewing v. *West Orange*, 89 N. J. L. 539 (Ct. of E. and A.); *Lehigh Valley R. R.* v. *United Lead Co.*, 102 N. J. L. 545.

Therefore, the appellee by its notice to Strike the Complaint admitted the allegations contained in the appellant's complaint which were well pleaded. The effect of this would entitle appellant to his claim under P. L. 1925, sec. 52, unless R. S. 17:12-53 be constitutional. Hence the only issue before the lower court was the question of the constitutionality of R. S. 17:12-53 and all its sources; which the lower court could only rule upon in dismissing appellant's complaint upon the ground of no cause of action (R. 10). The Court of Errors and Appeals in ruling upon the action of the lower court could only test the legal efficacy of the complaint by ruling on the constitutionality of R. S. 17:12-53. *Truax* v. *Corrigan*, 257 U. S. 312; *Adam* v. *Saenger*, 303 U. S. 59.

In *McCullough* v. *Virginia*, 172 U. S. 102, it was contended that the Supreme Court had no jurisdiction of this case for the reason that the State Court of Appeals did not consider in its opinion the subsequent legislation of the State, passed with a view to impair the Act of 1871, but limits itself to the consideration of that act. On page 116 the Court said:

> "It is true the Court of Appeals in its opinion only incidentally refers to Statutes passed subsequent to the Act of 1871, and places its decision distinctly on the ground that the act was void insofar as it related to the coupon contract, but at the same time it is equally clear that the judgment did give effect to the subsequent statutes, *and it has been repeatedly held by this Court that in reviewing the judgment of the Courts of a State we are not limited*

to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision." (Italics ours.)

In the case of *Crowell* v. *Randell*, (1836) 10 Peters 368, 392, Mr. Justice Story said (p. 392):

> "The principal, perhaps, the only important difficulty, which has ever been felt by the court, has been in ascertaining in particular cases, whether these matters (the question and decision) were apparent on the record. And here the doctrine of the court has been, that it is not indispensable that it should appear on the record, in *totidem verbis*, or by direct and positive statement, that the question was made and the decision given by the court below on the very point; but that it is sufficient, if it be clear, from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question, as indispensable to that judgment."

To the same effect are the following cases: *St. Louis Iron Mountain and Southern Railway Company* v. *Starbird, Administrator of Miller*, 243 U. S. 592; *Bryant* v. *Zimmerman*, 278 U. S. 63; [illegible] v. *Colehour*, 146 U. S. 153; *Lynch* v. *New York*, 293 U. S. 52; *Honeyman* v. *Hanan*, 300 U. S. 14; *New York* v. *Central Savings Bank*, 306 U. S. 661; *McGoldrick* v. *Gulf Oil Corp.*, 84 Sup. Ct. Rep. 336.

In the case at bar the record before the Court of Errors and Appeals made it imperative that the court decided whether or not the Federal Rights of the appellant were violated by R. S. 17:12-53; and, if there is any question as

NEW JERSEY COURT OF ERRORS AND APPEALS

HARRY M. VEIX,
Plaintiff-Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, A CORP.,
Defendant-Respondent.

NOTICE.

To Walter P. Reilly, Esq., Counsel for Plaintiff-Respondent:

PLEASE TAKE NOTICE, that on Monday, February 5th, 1940, at 10:30 A. M., or as soon thereafter as the court can hear the same, we shall make application to the Court of Errors and Appeals at the State House, Trenton, New Jersey, and bring to the court's attention the fact that the above-named appellant in his appeal of this case to the Supreme Court of the United States contends that this court has decided 1937 Revised Statutes of New Jersey, 17: 12-53, to be constitutional.

The respondent contends that the court only decided that Chapter 102 Pamphlet Laws 1932 amending Chapter 6 5 Pamphlet Laws 1925 was constitutional and we shall ask the court if it deems proper that the opinion and decision in the above case be clarified and for such other and further relief as may be necessary in the premises.

MULLIGAN & KOENIG,
Counsel for Defendant-Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS

HARRY M. VEIX,
Plaintiff-Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, A CORP.,
Defendant-Respondent.

ORDER DENYING MOTION TO AMEND OPINION AND REMITTITUR.

This matter being opened to the court by Fred G. Stickel, Jr., and Mulligan and Koenig, attorneys for the defendant-respondent in the presence of Walter P. Reilly and James L. Handford, attorneys for the plaintiff-appellant, on motion in behalf of the defendant respondent, to revise or supplement the opinion and remittitur in the above-entitled cause, and the court having heard arguments of counsel, and having considered the matter:

It is on this seventh day of February, 1940, ORDERED that the said motion be and the same is hereby denied.

LUTHER A. CAMPBELL,
C & P. J.

Endorsed: "Filed Feb. 7, 1940. Thomas A. Mathis, Clerk."

to the intent and purposes of the decision of the Court of Errors and Appeals, it has been repeatedly held, as in the above cited cases, by the Supreme Court of the United States in reviewing judgments of the highest court of a State that it is not limited to the opinion, but may examine and determine what is the real substance and effect of the decision.

II.

The Statute of Limitations cannot be interposed as a defense against appellant's rights to sue and recover under his contract.

The appellee cannot now urge a defense to appellant's action in this Court when it does not appear from the Record that it has availed itself of the affirmative defense of the Statute of Limitations, as it attempts to do on page 8 of its brief.

If the appellee had urged as a special defense the Statute of Limitations, it would be of no avail for the following reason:

The Certificates (R. 10 A—10 B) issued by the appellee to appellant recites that they were signed: "In Witness Whereof, the President and Secretary have hereunto attached their respective signatures and caused the seal of the Association to be affixed at Newark, N. J., * * *". Although the photostats of the Certificates do not clearly reproduce the impressions of the Corporate Seal contained on the originals, the latter will be lodged with the Clerk of this Court for inspection, if necessary.

These Certificates are sealed instruments for the payment of money, and therefore the Statute of Limitations in respect thereto would not bar appellant's right to sue and recover in accordance with his contract (R. S. 2:24-5).

In construing the source of the above section of the revision, the case of *Smythe* v. *Inhabitants of New Providence Township*, 253 Federal Reporter 824, the Court said at page 831:

> "Section 1 limits actions to 6 years and section 6, to 16 years. The former embraces actions founded on contracts 'without specialty', as did the original act of James I, and the latter actions, among others 'upon any single or penal bill for the payment of money only, or upon any obligation with condition for the payment of money only'. While the quoted clause of the last mentioned section does not in so many words refer to instruments under seal, **the courts of New Jersey have given to the terms used their well recognized legal significance and have construed that clause to cover actions 'upon sealed instruments for the payment of money only'.** *Elsasser* v. *Haines*, 52 N. J. Law 10, 22, 18 Atl. 1095, 1100."

Therefore, the Statute of Limitations is not a sound defense for the appellee.

III.

The withdrawal right is an integral part of appellant's contract and not a mere privilege.

On pages 29 to 33 of Appellees' Brief it again attempts to establish the fallacious theory that the power to withdraw is but a "Statutory Privilege". In doing so it ad-

vances the novel notion that the withdrawal right is a separate and distinct right from the original contract. As a matter of fact the power to withdraw, and to recover his investment was a vital part of the appellant's contract in 1928 and 1929, when he paid in full for his shares. He would not have invested his moneys but for the Association's agreement to repay it on thirty days' notice. The cases decided by this Honorable Court, cited by the appellee on pages 29 to 33 of its brief do not bear out its contention. They deal with such rights as, shortening of the Statute of Limitation, distinction between a judgment and a contract, the right to recover compensation arising because of condemnation proceedings; the right to demand interest upon a judgment. We concede that none of these involve contract obligations.

The case of *Morley* vs. *Railway Co.*, 146 U. S. 162 cited by the appellee at page 32 of its brief points out the distinction. Although interest on a judgment is not a contract right, nevertheless interest on a principal sum may be stipulated for in the contract itself and its payment in such a case is as much a part of the obligation of contract as the principal, and equally within the protection of the Constitution.

At page 19 of the Appellee's Brief and on page 8 of Brief of the State of New Jersey, both cite the case of *Intiso* vs. *Metropolitan Savings and Loan Association*, 68 N. J. L. 588. This old case, far from showing that withdrawals were unknown to the common law, discloses that the right to withdraw now is and always has been a contractual right which cannot be divested by subsequent legislation. If there is no statute regulating withdrawals, then

we must look to the original contract made by the shareholder when he originally took his shares to determine his withdrawal rights. If at that time there be a withdrawal statute, that statute becomes an integral part of his contract, and his contract as a whole cannot be impaired by subsequent legislation. Applying this to the facts in the *Intiso* case, we find that when he subscribed for his shares on June 1, 1898, there was no withdrawal statute. His contractual right to withdraw therefor necessarily was contained in the Constitution of the Association, as it was composed on June 1, 1898. That instrument permitted him to withdraw his shares on 60 days notice with interest at 4% less a withdrawal fee of a $1.00 per share, and further provided that no more than 50% of the dues received in any month should be applicable to the payment of withdrawals. A subsequent statute of 1899 made no provision for a withdrawal fee such as had been provided in the constitution of the association when Intiso became a member. The court said at page 590:

> "In becoming a member of the Metropolitan Savings and Loan Association, Intiso agreed to the condition imposed on withdrawal of shares. It is not competent for the legislature to impair the obligation of that contract."

It follows therefore that the basis of the right of withdrawal now is and always has been contractual. When there was no withdrawal statute, if the Constittuion and By Laws of the Association and the stock certificate did not give the shareholder any right to withdraw, then he must remain a member and pay his dues until maturity or forfeit all the moneys that he had paid in.

This is the "public scandal" alluded to by the appellee on page 16 of his Motion to Dismiss.

Therefore in 1899 the New Jersey Legislature attempted to regulate withdrawals by statute. This statute was for the protection of the shareholder, it prevented a withholding and a forfeiture of the shareholder's instalments by an unscrupulous association. So does the 1925 Act.

The first statute regarding withdrawals was the 1899 Act mentioned in the *Intiso* case *supra*. This Statute was held not to be applicable to contracts made prior to its enactment but as to contracts made subsequent thereto, the statute had to be read into the contract and became an integral part of it. Therefore, at any particular time, we have to examine the contract, which includes the Constitution and by-laws of the Association, the Stock Certificate of the member and the withdrawal Statute, in existence at the time the contract was made.

We have mentioned the situation as it stood in the *Intiso* case. When the shares were issued the contract consisted solely of the Constitution, By-Laws and Stock Certificate. Subsequent New Jersey Legislation was not permitted to impair that contract.

It might be noted here that the Constitution of the Association prior to the 1899 Act in the *Intiso* case provided that not more than one-half of the dues should be applicable to the payment of withdrawal. The 1899 Act, page 357, contains a similar provision.

That Association need not pay more than 50% of its income on withdrawals, whether the contract was made with the Metropolitan Savings and Loan Association prior to the Act of 1899, or while that act was in effect.

After 1899 the legislature of New Jersey enacted various withdrawal statutes until we reach P. L. 1925 Chapter 65. Just like the previous cases, every shareholders' rights are governed by the terms of the Constitution and By-Laws of the Association, by his stock certificate and by the statute as it existed when the contract was made.

In 1928 and 1929, when the appellant made his contract, Section 52 P. L. 1925, became an integral part of it. That statute is quite different from the statute mentioned in the *Intiso* case. Not only did it require the association to apply at least 50% of its income to the payment of withdrawals, but it gave the shareholder a further right. **It did not limit him to a particular fund but gave him a right to sue for and recover the withdrawal value of his shares if he was not paid within six months from the date of the withdrawal notice.** That was an integral and vital part of his contract which could not be impaired by subsequent legislation.

The situation now before this Court is quite similar to the case of *Sautter* vs. *Supreme Conclave Improved Order of Heptasophs*, 76 N. J. L. 763, decided by the New Jersey Court of Errors and Appeals. In this case when the assured became a member of the association his application for membership was subject to the By-Laws then in existence, or that might be thereafter adopted, and his contract further provided that the association would pay $1,000 to his widow—within sixty days from the receipt of satisfactory proof of his death. After the date of his contract and before his death the By-Laws were amended to provide no benefit for a member who should commit suicide. The defendant's answer to a suit on the contract was

that the member had died by suicide. On demurrer to the answer on the ground that it did not set out a bar to the plaintiff's right to recover the court said, page 765.

> "The certificate was a contract of a definite character and conferred a vested right upon the beneficiary and upon the member a property right."

The court held that the contract dated from the time of membership, and not from the date of the death or from the date of the receipt of satisfactory proof of death, and gave judgment accordingly. Likewise in the case at bar the rights of the plaintiff regarding withdrawal were vested from the date when appellant became a member of the Association, and his vested contract rights could not be changed or altered by subsequent legislation.

IV.

Chapter 102 P. L. 1932 impairs appellant's vested contract rights and his vested property rights.

What we have said in our main brief regarding the unconstitutionality of 1937 New Jersey Revised Statutes 17: 12-53, applies also to Chapter 102 of the Laws of 1932. The State of New Jersey in its brief *amicus curiae* filed in this cause at page 6 tabulates the changes in very convenient form.

They are:

1. The 1932 definition of monthly receipts limits funds applicable for payment of withdrawals.

2. The provision in the 1925 Act that in no case shall payment be postponed for a period longer than six months is eliminated by the 1932 act.

3. The provision in the 1925 act that a withdrawing member may sue for and recover the withdrawal value of his shares if the same is not paid in six months is eliminated by the 1932 act.

4. The 1932 act establishes a withdrawal list with payment, out of 50% of the receipts, to be made $500 to each member in rotation.

5. The 1932 Act prohibits all withdrawals by prepaid shareholders so long as funds available are insufficient to pay all matured shares.

6. The 1932 act prohibits suit by a withdrawing shareholder so long as funds are disbursed as in that act directed.

It is respectfully submitted that these changes, as stated in *Buesi* vs. *Longworth Building and Loan Association*, 119 N. J. L. 120, do impair the appellant's vested contract rights and his vested property rights. Our argument is contained in our main brief under the Points II, III and IV to which we beg leave to refer, and we must add that by the 1932 act as by R. S. 17:12-53 the payment of matured shares have a preferential right over payment of prepaid shares.

V.

Chapter 65 P. L. 1925, in so far as applied to appellant, did not make him an equal participant with all the other members.

Appellee fallaciously asserts many times through its brief, and so does the brief in behalf of the State of New Jersey, that there is a certain "equality, equity and mutuality" between all shareholders of a building and loan association. It is respectfully submitted that this is not so. Each member's contract must be examined to determine his individual rights.

The appellant is not an instalment shareholder. He is a prepaid shareholder. He has been a matured shareholder from the day he invested his money. He is limited to a fixed interest rate of six per centum per annum. He does not share in the general profits of the association. There is no mutuality, or equality between him and the instalment shareholders. This is very ably stated in the recent case of *Cohen v. Swink*, 3 S. E. 2nd 471; 476 (Va.) in the following language:

> "When the differences in their contractual relations are noted, the application of the 'supreme rule of equality and mutuality' would be abortive of the principle and it would be destructive of itself. Equality, as equity perceives it cannot be had by taking the rights which one has, for the benefit of another who is not entitled to enjoy them. Equality without justice is non-existent."

It is this attempt to make all shareholders equal, who are not equal, which was condemned by this Honorable Court in the case of *Treigle* v. *Acme Homestead Association*, 297 U. S. 189, in these words: "* * * they do alter the rights of withdrawing members as between themselves and as against continuing members. * * * They deprive withdrawing members of a solvent association of existing contract rights, for the benefit of those who remain."

Conclusion.

It is respectfully submitted that the judgments of the New Jersey Court of Errors and Appeals and of the New Jersey Supreme Court should be reversed; New Jersey 1937 Revised Statutes 17:12-53 and its various sources from 1932 to its enactment should be declared unconstitutional, and since this situation has existed already in New Jersey for nearly eight years, that judgment be now entered in this Court in favor of the appellant in accordance with his original complaint.

WALTER P. REILLY,
JAMES L. HANDFORD,
Counsel for Appellants.